SUPREME COURT OF APPEALS OF VIRGINIA.

SOUTHERN RY. CO. v. STOCKDON.

March 14, 1907.

[56 S. E. 713.]

1. Railroad—Accidents at Crossings—Actions for Injuries—Pleading.—In an action for injuries received at a railway crossing where a watchman was kept, allegations of the complaint which aver that plaintiff drove upon the track without looking, when he might have done so, do not show affirmatively that he was guilty of contributory negligence, and were not bad on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1112.]

2. Same—Ordinance Violated—Unconstitutionality.—Where a count of a complaint in an action for injuries received at a railway crossing states a good cause of action in other respects, a demurrer will not be sustained to it, on the ground that the speed ordinance alleged to have been violated by the defendant, was unconstitutional.

3. Same.—Where a count of a complaint in an action for injuries at a crossing states a good cause of action, a demurrer to it will not be sustained on the ground that it does not allege that the violation of a certain ordinance by the defendant, if valid, was the proximate cause of plaintiff's injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1110.]

4. Same—Admissibility of Evidence.—In an action against a railway company for injuries received at a crossing in a town, where it was shown by defendant's time-table that it knew of the ordinance of the town regulating the speed within its limits, it was not error to admit the ordinance in evidence, even though by the law it was only open for inspection to the voters of the town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1133.]

5. Trial—Order of Proof—Discretion of Court.—In an action against a railway for injuries at a crossing, where the violation of a speed ordinance was one of the grounds relied on to show the negligence of the company, it was not error to admit the ordinance in evidence, even if no foundation had been laid for its introduction, since the order of introducing evidence is in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 139, 141.]

6. Damages—Personal Injuries—Evidence—Earning Capacity.—In an action for personal injuries, the court properly allowed the plaintiff to testify that several years ago he earned $40 a month as a wheelwright, and that he was earning more at the time of the accident, selling machinery upon commission, though he was unable to state

the precise amount, since this was evidence tending to show his earning capacity at the time of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 490.]

7. Railroads—Accident at Crossing—Action for Injuries—Questions for Jury.—In an action against a railway for injuries received at a crossing where a watchman was stationed, the question of whether the watchman gave proper warning of the approach of the train was for the jury, even though the preponderance of the evidence was to the effect that he did give warning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1155-1164.]

8. Same—Instructions—Negligence of Defendant.—An instruction in an action against a railway for injuries received at a crossing charged the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town in itself was not negligence which would render defendant liable. Held, that this instruction was not contradicted by one which told the jury that, in determining whether the defendant was negligent, they could consider the fact, if it was a fact, that the defendant's train was running at a greater rate of speed than was allowed by the ordinance of the town, along with the other facts of the case.

9. Same—Contributory Negligence.—An instruction, in an action against a railway for injuries received at a crossing within the limits of a town, charged that plaintiff in approaching the crossing had the right to assume that the defendant would obey the speed ordinance of the town, and, if they believed that the train was running at a greater rate of speed than allowed by the ordinance, they might consider the fact, along with the other cirucumstances of the case, in determining whether plaintiff was guilty of contributory negligence. Held, that this instruction was not in conflict with one which charged the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town in itself was not negligence which would render defendant liable.

10. Same—Rate of Speed—Violation of Statute or Ordinance.—A traveler approaching a railway crossing in a town has a right to assume that the railway company will obey the speed ordinance of the town, whether he sees or hears the train or not, unless his sight or hearing inform him that the company is running its train in violation of the ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1071-1074, 1187.]

11. Same—Contributory Negligence—Question for Jury.—In an action for injuries received at a railway crossing where a watchman was stationed, the preponderance of the evidence was that the watchman warned the plaintiff in time of the approaching train; yet there was evidence that the warning was given too late. The evidence as to

the care exercised by plaintiff in looking and listening as much as possible before going upon the track was also in dispute. Held, that the question of plaintiff's contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1166-1186.]

12. Same—Instructions.—In an action for injuries received at a railway crossing where a watchman was stationed, defendant asked an instruction that it was plaintiff's duty to approach the crossing at such a gait that he could stop if warned of an approaching train. The instruction, as amended and given, told the jury that the plaintiff should have approached the crossing at such a gait that he could stop if warned in time of an approaching train, and, if he did not do so, he could not recover. Held, not error to refuse to give the instruction as offered, and in giving it as amended, since the instruction as asked ignored the fact that a watchman was kept at the crossing to give warning of approaching trains.

13. Trial—Refusal of Requests—Instructions Already Given.—In an action for injuries received at a railway crossing, refusal to instruct that plaintiff could not recover if his negligence contributed to the accident, even if the defendant was negligent, was not error, where this issue was covered by a given instruction that, if the plaintiff's negligence contributed to any extent to his injury, he could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Circuit Court, Orange County.

Action by H. W. Stockdon against the Southern Railway Company. Judgment for plaintiff, and defendant appealed. Affirmed.

The following is a copy of the complaint:

"Henry W. Stockdon, plaintiff, complains of the Southern Railway Company, a corporation, defendant, of a plea of trespass on the case, for this, to wit, that heretofore, to wit, at the time of and before the commission of the grievances hereinafter set forth, the said defendant was and has hitherto continued to be a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad track, a part of which then extended, and still extends, through the town of Orange, a municipal corporation, in the county of Orange, in the state of Virginia, and over and through the streets of the said town; that upon its said railroad track, a part of which was placed and laid through the town of Orange as aforesaid, the defendant in and about its said business, at that time used and ran, and has hitherto continued to use and run, certain trains of cars drawn by locomotive engines belonging to it. Plaintiff al-

leges that Main street—a public street of said town—in said town, crosses, and then did cross, said defendant's railroad track nearly at right angles, running nearly east and west, and that any person approaching, by way of said street, said crossing from the east side thereof, cannot, and could not then, see a train approaching on defendant's track from the north until he reaches said defendant's railroad track; the view of said person toward the north being obstructed.

"And said plaintiff avers that it then was, and still is, the duty of the defendant in the management, conduct, control, and running of its trains of cars drawn by its locomotive engines as aforesaid to use due and reasonable care and precaution to avoid running its trains of cars drawn by its locomotive engines, as aforesaid, against or upon, and to avoid colliding with, any person upon, or approaching, its said crossing.

"And the plaintiff avers that heretofore, to wit, on the 16th day of December, 1903, he, the said plaintiff, upon and by way of said Main street, approached the said crossing from the east side thereof, in his buggy drawn by one horse, and then and there exercising due care, being in said buggy drawn as aforesaid, entered upon said crossing, using due care in approaching and entering upon same.

"And the plaintiff avers that the defendant did not do and perform its duty in using due and reasonable care and precaution in the management, conduct, control, and running of its trains of cars, drawn by its locomotive engines as aforesaid, to avoid running its trains of cars, drawn by its locomotive engines as aforesaid, against and upon, and to avoid colliding with, plaintiff, as he, using due care, approached and entered upon said crossing, but, on the contrary, defendant did, at the said time and place, so negligently, carelessly, and wrongfully manage, conduct, control, and run one of its said trains of cars, south-bound, known, plaintiff believes, as train 'No. 29,' drawn by one of its locomotive engines as aforesaid, that the said train of cars, drawn by its locomotive engine as aforesaid, ran against and upon, and collided with, plaintiff, at the time and place aforesaid, whereby, and in consequence of which negligent, careless, and wrongful acts and conduct of defendant, plaintiff was struck, run against, and collided with by said train of cars, drawn by its locomotive engine as aforesaid, and was thereby seriously and permanently injured and disabled, and thereby so became, and was, and has since so continued to be; and thereby suffered and underwent, and has since said time suffered and undergone, and still continues to suffer and undergo, great physical and mental pain and agony, and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and

thereby has been compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his said buggy was demolished and destroyed.

"And for this, to wit, that heretofore, to wit, at the time of and before the commission of the grievances hereinafter set forth, the said defendant was, and has hitherto continued to be, a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended and still extends through the town of Orange, a municipal corporation, in the county of Orange, in the state of Virginia, and over and through the said streets in the said town; that upon its said railroad track, a part of which was, and is, placed and laid through the town of Orange as aforesaid, the defendant, in and about its said business, then used and ran and has hitherto continued to use and run, certain trains of cars, drawn by locomotive engines belonging to it. Plaintiff alleges that Main street, public street in said town, in said town, crosses and then did cross said defendant's railroad track nearly at right angles, running nearly east and west, and that any person approaching, by way of said street, said crossing from the east side thereof, cannot, and could not then, see a train approaching upon defendant's track from the north until he reaches said defendant's railroad track; the view of said person, toward the north, being obstructed.

"And plaintiff avers that there was at the time of the commission of the grievances herein set forth, and has continued hitherto to be, a legal and valid ordinance of, and in, the said town of Orange, prohibiting trains from running through said town at a greater rate of speed than six miles an hour, and that it was at the said time, and has hitherto continued to be, the duty of defendant not to run, or allow to be run, its trains through the said town at a greater rate of speed than six miles an hour, in such manner as to unreasonably endanger persons using said crossing.

"And the plaintiff avers that heretofore, to wit, on the 16th day of December, 1903, he, the said plaintiff, upon and by way of said Main street approached the said crossing from the east side thereof, in his buggy drawn by one horse, and then and there exercising due care, being in said buggy drawn as aforesaid, entered upon said crossing, using due care in approaching and entering upon the same.

"And the plaintiff avers that the defendant did not do and perform its duty in not running, or allowing to be run, its trains through the said town at a greater rate of speed than six miles an hour, in such manner as to endanger, unreasonably, persons

using said crossing; but, on the contrary, did utterly disregard its said duty, and did, at the time and place aforesaid, negligently, carelessly, and wrongfully run, or allow to be run, one of its said trains of cars, drawn by one of its locomotives engines as aforesaid, south-bound, known, plaintiff believes, as train 'No. 29,' at a great and unlawful rate of speed, to wit, at the rate of 25 miles an hour, and in such negligent, careless, and wrongful manner as to so unreasonably endanger plaintiff that, when he, using due care in approaching on and by way of said street and entering upon said crossing, he was run against and struck by the locomotive engine drawing said train of cars, whereby he was seriously and permanently injured and disabled, and has hitherto continued so to be, and thereby suffered and underwent, and has hitherto continued to suffer and undergo, and still continues to suffer and undergo, great mental and physical pain and agony; and thereby was, has hitherto continued to be, and still is, unable to attend to and transact his lawful business and affairs, and thereby has been compelled to pay, lay out, and expend a large sum of money in endeavoring to get cured and healed of the injuries inflicted upon him as aforesaid; and thereby his buggy was demolished and destroyed.

"And for this, to wit, heretofore, to wit, at the time of and before, the commission of the grievances hereinafter set forth, the defendant was and has hitherto continued to be, and still is, a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended, and still extends, through the town of Orange, a municipal corporation, in the county of Orange, state of Virginia, and over and through the streets of said town; that upon its said railroad track, a part of which was and is placed and laid through the town of Orange as aforesaid, the defendant in and about its said business, at that time used and ran, and has hitherto continued to use and run, certain trains of cars drawn by locomotive engines belonging to it.

"Plaintiff alleges that Main street, a public street of said town, in the said town, crosses, and then did cross, said defendant's railroad track nearly at right angles thereto, said street running nearly east and west, and that a person approaching and crossing said railroad track from the east side thereof cannot, and could not then, see a train approaching the said crossing from the north upon defendant's track; the view of the person so approaching being obstructed by buildings, and other things, some of which obstructions were placed there by defendant. Plaintiff alleges that said crossing, owing to said obstructions and the noise of traveling vehicles and other noises thereabouts, was then, and is now, dangerous, and that defendant, in

recognition of this fact, then, as now, employs a watchman to stand at said crossing to give the public timely warning of approaching trains, and that plaintiff had notice of this fact (that the said watchman was so employed) and had the right to rely thereon.

"And plaintiff says it was the duty of defendant, through its said watchman, to notify, and give him timely warning, when approaching said crossing from the east side thereof, of any danger from trains approaching over defendant's track from the north, especially trains approaching at a great and unlawful rate of speed.

"Plaintiff alleges that on December 16, 1903, there was, and still is, a legal and valid ordinance of and in the town of Orange aforesaid prohibiting trains from being run through said town at a greater rate of speed than at the rate of six miles an hour. Plaintiff alleges that on said 16th day of December, 1903, he, using due care, approached said crossing from the east side thereof, by way of said Main street, in a buggy drawn by one horse, using due care in so approaching said crossing; that at said time and place said plaintiff could not and did not hear the approach of said defendant's train, owing to the noise made by a wagon just in front of plaintiff, and other noises.

"Plaintiff avers that said watchman, in utter disregard of his duty, did not give him timely warning when approaching said crossing, but utterly failed to do so. Plaintiff avers that he drove upon said crossing, using due care in so doing, and was there struck, and run upon and against by defendant's southbound passenger train, drawn by its locomotive engine as aforesaid, known, plaintiff believes, as train 'No. 29,' which said train was at that time running at a great and unlawful rate of speed, to wit, at the rate of 25 miles an hour, and that said watchman, in utter disregard of his duty, gave no notice or warning to said plaintiff until plaintiff was crossing said track, or so near thereto as to be unable to escape being struck and run upon and against by said train running as aforesaid; that the warning then given operated, and as then given could not but operate, to hinder and delay him in his efforts to prevent being run upon and against and struck by said train.

"Plaintiff alleges that but for the negligent, careless, and wrongful conduct, acts, and default of defendant, as hereinbefore set forth, he would not have been struck or run upon or against by said train. Plaintiff alleges that by being so struck and run upon and against by defendant's train, in consequence of the negligent and wrongful conduct, acts, and default of the defendant, he was seriously and permanently maimed, injured, disfigured, and disabled, and thereby suffered and underwent,

and has since said time hitherto suffered and undergone, and still suffers and undergoes, great physical and mental pain and agony; and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and thereby was compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his buggy was demolished and destroyed.

"And for this, to wit, that heretofore, to wit, at the time of and before the commission of the grievances hereinafter set forth, the said defendant was and has hitherto continued to be, and still is, a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended, and still extends, through the town of Orange, a municipal corporation, in the county of Orange, state of Virginia, and over and upon the streets of said town; that upon its said railroad track, a part of which is placed and laid through the town of Orange as aforesaid, the defendant, in and about its said business, at that time used and ran, and has hitherto continued to use and run, certain trains of cars drawn by locomotive engines belonging to the said defendant.

"Plaintiff alleges that Main street, a public street of said town, in the said town, crosses, and then did cross, said defendant's railroad track nearly at right angles thereto, said street running nearly east and west, and that a person approaching said railroad track from the east or west side thereof cannot, and could not then, see a train approaching the said crossing from the north upon said defendant's track, the view of a person so approaching being obstructed by buildings erected along said street and extending nearly to the track on both sides thereof, some of which obstructions were placed there by defendant.

"Plaintiff alleges that houses are built along the south margin of said Main street nearly down to the said track on the east side thereof, and that a person approaching said crossing from the east side of said Main street could not then, and cannot now, see a train approaching from the south upon said track; that the said street on either side of the said railroad track consists mainly of uneven stony ground, and that vehicles passing over the same create a great deal of noise, and plaintiff alleges that, owing to said obstructions of view, the noise of passing vehicles, and other noises incident to the said town, the said crossing was, and is, extremely dangerous, and the said defendant well knew it to be so, and recognizing the danger at the said crossing then had, and now has, a watchman stationed thereat to give the public timely warning of approaching trains.

"Plaintiff alleges that it was the duty of the defendant to give to the said watchman ample warning of trains approaching the said crossing to enable him to warn the public against the danger of approaching trains. Plaintiff alleges that on the 16th day of December, 1903, there was, and still is, a legal and valid ordinance of the town of Orange aforesaid prohibiting trains from being run through said town at a greater rate of speed than the rate of six miles per hour. Plaintiff alleges: That on the day and year aforesaid plaintiff, using due care, approached said crossing from the east side thereof by way of said Main street in a buggy drawn by one horse, plaintiff having first attempted to cross the said railroad at a crossing in said town some distance south of the crossing aforesaid, but was prevented from so crossing by a train standing thereon, and thereupon approached the said railroad by way of said Main street crossing aforesaid. That at the time of approaching the said crossing the train hereinafter mentioned was long past due and plaintiff supposed that it had passed. That plaintiff used due care and caution in approaching said crossing. That immediately in front of plaintiff as he approached said crossing was a one-horse wagon, which was driven across said track immediately in front of plaintiff's horse. That, owing to the noise made by the said wagon and plaintiff's buggy, and an engine then blowing off steam on the side track, it was impossible for plaintiff to hear the train hereinafter mentioned.

"That the said watchman gave plaintiff no warning of the approaching of the said train hereinafter mentioned until it was too late to escape injury; that the said defendant did not sound the whistle or ring the bell of the train hereinafter mentioned as it approached said crossing as the law requires it to do, and, owing to the obstructions aforesaid, it was impossible for plaintiff to see said train before entering upon said crossing, and plaintiff did not see or hear the same until on said crossing.

"Plaintiff avers that he drove upon the said crossing under the circumstances aforesaid, using due care in so doing, and was there struck and run against and upon by defendant's southbound passenger train No. 29, as plaintiff is informed, which said train was running at a great and unlawful rate of speed, to wit, at the rate of 35 or 40 miles per hour. Plaintiff alleges but that for the negligent, careless, and wrongful conduct, acts, and defaults of the defendant, as hereinbefore set forth, he would not have been struck or run upon or against by said train. Plaintiff alleges that by being so struck, run upon, or against by said defendant's train, in consequence of the negligence and wrongful conduct, acts, and default of the defendant, he was seriously and permanently maimed, injured, disfigured, and dis-

abled, and thereby suffered and underwent, and has since said time hitherto suffered and undergone, and still suffers and undergoes, great mental and physical pain and agony, and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and thereby was compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his buggy was demolished and destroyed.

"And the plaintiff says that by reason of the premises, and by reason and in consequence of the negligent and careless and wrongful conduct, acts, and default of the defendant, as set forth in the first, second, third, and fourth counts of this declaration, he has sustained great damage, to wit, $10,000.

"And therefore he brings this suit."

J. D. Horseley and *Geo. S. Shackleford,* for plaintiff in error.

Gordon & Gordon and *A. T. Browning,* for defendant in error.

BUCHANAN, J. This is an action to recover damages for injuries done to the person and property of H. W. Stockdon by one of the Southern Railway Company's passenger trains running upon him whilst driving across the railroad tracks where its road crosses Main street in the town of Orange.

There was a demurrer to the declaration and to each count thereof. The court sustained the demurrer as to the first and overruled it as to the other counts.

In this ruling we see no error, as the counts which the court held to be good do not show affirmatively, as contended, that the plaintiff was guilty of contributory negligence. Neither are the other grounds of demurrer to these counts tenable, even if it were true that the ordinance of the town of Orange regulating the speed of railroad trains was unconstitutional; and that the second count does not allege that the violation of the ordinance, if valid, was the proximate cause of the plaintiff's injuries, since the other allegations in each count state a good cause of action. A. & D. Ry. Co. *v.* Relger, 95 Va. 418, 428, 28 S. E. 590.

The defendant company objected to the introduction of the town ordinance prohibiting railroad trains from running at a greater rate of speed than six miles an hour whilst passing through its corporate limits, first, because the ordinances of the town were only open for inspection to the voters of the town, and therefore, as other persons were not permitted to see them, they could not be bound by them; and, second, because the ordinance was not pertinent testimony to any issue in the case, and no foundation had been laid for its introduction.

In answer to the first objection, it is sufficient to say that the time-table of the defendant company shows that the com-

pany had knowledge of the ordinance, since it provided that its trains must not be run at a greater rate of speed than six miles an hour in certain towns through which its road passes, among which is the town of Orange. As to the other objection, the violation of the ordinance was one of the grounds relied on to show negligence on the part of the company, and as the order of introducing evidence is in the discretion of the trial court, even if it was introduced before any foundation had been laid for its introduction, it would be no ground for reversal.

The plaintiff while on the stand as a witness testified that some years before his injury he earned $40 per month as a wheelwright, and that he was earning more at the time of the accident in selling machinery upon commission, though he was unable to state the precise amount of his commissions. The evidence was objected to as remote and speculative, the objection was overruled, and this action of the court is assigned as error.

The evidence was clearly admissible as tending to show that the plaintiff's earning capacity was at least $40 per month when he was disabled by the injuries complained of.

As is so frequently the case in actions of this kind, many more instructions were asked for and given than the questions of law involved in the case required, and more than could be helpful to the jury. The defendant company asked for 15 instructions, of which the court gave 7 as asked, 4 as amended, and refused to give the other 4. It gave for the plaintiff seven instructions. The action of the court in giving the instructions asked for by the plaintiff, except the fourth and seventh, in amending instructions 3, 6, 7, and A, offered by the defendant, and in rejecting defendant's instructions 5, 10, B, and C, is assigned as error.

Instruction No. 1, given by the court at the instance of the plaintiff, is objected to because, as we understand the assignment of error, there was no evidence upon which to base it as to the failure of the watchman to give proper warning as the plaintiff approached the crossing. While the preponderance of evidence is with the defendant on this question, there was evidence tending to show that the watchman gave no warning until it "was too late to do any good." The instruction is also objected to because it contradicts the defendant's instruction No. 12, which told the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town "in itself was not negligence in this case which would render the defendant liable." By instruction No. 1 the jury were told, in effect, that in determining whether or not the defendant company was guilty of negligence they could consider the fact, if it was a fact, that the defendant's train was running

at a greater rate of speed than was allowed by the ordinance of the town, along with the other facts of the case.

It has been frequently held by this court that the mere running of a train in violation of law or of an ordinance is not per se negligence for which a recovery can be had; yet it is always a circumstance to be considered, along with the other facts and circumstances of the case, in determining the question of negligence.

Instruction No. 5, given upon the motion of the plaintiff, is objected to because it is in conflict with the said instruction No. 12. By instruction No. 5 the jury were told that the plaintiff in approaching the crossing had the right to assume that the defendant would obey the ordinance of the town, and not run its train at a greater rate of speed than six miles an hour, and, if they believed from the evidence that the train was running at a greater rate of speed, the jury might consider the fact, along with the other circumstances of the case, in determining whether or not the plaintiff was guilty of contributory negligence.

For the reasons given in discussing plaintiff's instruction No. 1, it is plain that there is no conflict between instructions 5 and 12.

Instruction 5 is further objected to because the ordinance could have no possible bearing upon the question of the plaintiff's contributory negligence, as he had neither seen nor heard the train.

We know of no reason why a traveler approaching a railroad crossing has not as much right to assume that the railroad company will obey the ordinance of the town, where the train is neither seen nor heard, as where he both sees and hears it. His seeing and hearing has nothing to do with the assumption that the railroad company will obey the ordinance, unless his sight or hearing informs him that the company is running its train in violation of the ordinance. In that event, of course, he could not assume what he knew was not a fact.

Instructions 2 and 3, given at the instance of the plaintiff, are objected to because there was no evidence upon which to base them. While the preponderance of evidence is in favor of the defendant's contention that the watchman did his duty in warning the plaintiff of the approaching train, and before he was in peril, yet there was evidence tending to prove (and if the jury believed it sufficient to prove) that the warning was given too late, and but for the plaintiff checking his horse when he heard the watchman's call to stop, or "Go back," he might have crossed the track unharmed.

One of the questions which the jury had to determine was

whether or not the plaintiff was guilty of contributory negligence in failing to listen and look for approaching trains after reaching the tower house, which was within 6 feet of the side track, and 19 feet of the main track of the defendant company's road. The contention of the defendant is that, inasmuch as there was no place from where the plaintiff drove into Main street until he reached the tower house where looking could be made effective, it was his duty to look for trains in both directions when he reached that point, and that, if he had done so by leaning forward in his buggy when his horse's head was within 6½ feet of the main track, he could have seen along that track in the direction from which the train was coming which struck him a distance of nearly 800 feet; and that his failure to do so was contributory negligence. The plaintiff, on the other hand, insists that from the time he came into Main street he had been listening for trains, and had looked through the narrow space between the Thompson house and the tower, the only place where it was possible to see the defendant's track to the north, and neither heard nor saw the train; that the watchman gave no warning and was not in the middle of the street where he always saw him when trains were approaching, which he thought meant that the way was clear; that a wagon just in front of him had crossed the track; that the ordinance prohibited trains from running more than six miles an hour through the town; that, when he passed the tower where he could see, his buggy was on the side track, and his horse's head within six feet of the main track, a place of peril if a train should pass; and that under these conditions ordinary care required him to drive rapidly over the main track, as he was attempting to do when struck by the train.

Whether or not the plaintiff was guilty of contributory negligence in failing to look for trains at that point under the circumstances disclosed by the evidence was a question for the jury. Kimball & Fink *v.* Friend's Adm'r, 95 Va. 125, 138, 139, 27 S. E. 901.

Instruction 6, given for the plaintiff, and instruction 6, as amended and given for the defendant, fairly submitted that question to the jury.

By the defendant's instruction 3, as offered, the court was asked to tell the jury that the plaintiff should have approached the crossing at such a gait as would have enabled him to stop if warned of an approaching train. The instruction as amended by the court told the jury that the plaintiff should have approached the crossing at such a gait as would have enabled him to stop if warned in time of an approaching train, and, if he did not approach at such a gait, he could not recover. The

refusal of the court to give the instruction as offered, and in amending it and giving it as amended, is assigned as error.

The defendant's instruction ignored entirely the fact that there was a watchman kept at the crossing to warn travelers of approaching trains. The court did not err in refusing to give it as offered nor in giving it as amended.

The court did not err in refusing to give instruction No. 10, offered by the defendant, which was to the effect that the plaintiff could not recover if by his negligence he contributed to the accident, even if the defendant was guilty of negligence, because upon that question the jury had been fully instructed by the defendant's instruction No. 1.

Without discussing further the action of the court in giving, amending, and refusing instructions, it is sufficient to say that the instructions given submitted the case to the jury fully, and as favorably to the defendant as it was entitled to have it submitted, and that the court committed no error in refusing to give the other instructions offered by the defendant.

The case was clearly one for the determination of the jury, and the circuit court did not err in refusing to set aside the verdict.

The judgment complained of must therefore be affirmed.

Note.

We believe that our supreme court has never yet gone so far as to say that an act done in violation of a statute or an ordinance is negligence per se, which is the rule in some states. Nor has it ever adopted the rule that obtains in other states that the violation of such statute or ordinance raises a prima facie presumption of negligence. But we are warranted by the principal case in saying that the rule in Virginia, and this is the true rule, is that the violation of a city speed ordinance is to be considered with all the other evidence in the case as reflecting on the question of negligence. See Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

This question has been so fully covered by many well-considered cases in Ohio, that we will be pardoned for confining the note to cases taken from that state alone.

It has been held, repeatedly, in Ohio, that while the violation of a city speed ordinance, is not negligence per se, yet it may be considered by the jury as reflecting on the question of negligence. Stoltz *v.* Baltimore, etc., R. Co., 7 O. Dec. 435, affirmed in 18 O. C. C. 93, 9 O. C. D. 638, 62 O. St. 639, 58 N. E. 1101; Pennsylvania Co. *v.* Trainer, 18 O. C. C. 716, 7 O. C. D. 567; Lake Shore, etc., R. Co. *v.* Johnston, 1 O. C. C., N. S., 357, 15 O. C. D. 41.

In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient per se to create a liability, is yet competent to go to the jury as tending to show negligence. Meek *v.* Pennsylvania Co., 38 O. St. 632.

Where, in an action against a railway company for the wrongful death of one of its employees, the negligence charged being that the train which killed the deceased was run at a speed so excessive

(forty miles an hour) as in itself to constitute negligence; an ordinance of the city within whose limits the accident occurred, limiting the speed of all railway trains to six miles per hour, is admissible in evidence. Erie R. Co. *v.* McCormick, 3 O. C. C., N. S., 652, 14 O. C. D. 86.

Where a city council, by ordinance, has prohibited the running of railroad trains through its limits at a rate of speed greater than that named in the ordinance, a traveler upon a street in such city, crossing the track of a railroad, has a right to presume that the company will conform to such regulation. If he acts in accordance with such presumption in the absence of knowledge of the fact that the railroad company is exceeding such limit in running a train, it will not of itself be an act of negligence. Meek *v.* Pennsylvania Co., 38 O. St. 632; Hart *v.* Devereaux, 41 O. St. 565.

Fast Driving.—The violation of a city ordinance, in driving or causing a carriage to be driven around the corner of a street faster than a walk, is not of itself negligence, or, independent of any other facts, conclusive on that question. Bell *v.* Pistorius, 18 O. C. C. 73, 9 O. C. D. 869, citing Meek *v.* Pennsylvania Co., 38 O. St. 632.

A person about to cross a street of a city in which there is an ordinance against fast driving, has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons. Baker *v.* Pendergast, 32 O. St. 494.

But where he knows that others are driving along the street, at the place of crossing, at a forbidden rate of speed, and he has full means of seeing the rate at which they are driving, the existence of such ordinance will not authorize a presumption which is negatived by the evidence of his senses. If the attempt to cross the street, under the circumstances, would be negligence on his part, the fact of the existence of such city ordinance is not evidence tending to free him from culpability. Baker *v.* Pendergast, 32 O. St. 494.

Knowledge of Statute or Ordinance.—Where there is a city ordinance limiting the speed at which trains can be run within city limits, and a person at a crossing sees and knows of an approaching train and attempts to cross and is thereby injured, if he knows of the existence of the ordinance and has reason to believe it will be observed by the persons in the management of the train, and the injury would not have occurred but for its violation, or, when the ordinance has induced him to do something or omit the doing of something which, without that knowledge, he would either have done or not have omitted to do, his act will not constitute such contributory negligence as will prevent a recovery. But it is error to instruct the jury that if they find the fact of the plaintiff being a non-resident of the city, residing without its limits, his ignorance of the ordinance is to be presumed. Pennsylvania Co. *v.* Trainer, 18 O. C. C. 716, 7 O. C. D. 567.

Contributory Negligence.—Where a track walker goes upon a railway bridge over which trains habitually run at a high rate of speed, knowing there is a train long overdue and without looking for its approach, he is guilty of contributory negligence, notwithstanding a municipal ordinance limits the speed of trains at that point to six miles an hour. Erie R. Co. *v.* McCormick, 3 O. C. C., N. S., 652, 14 O. C. D. 86.

Evidence.—In an action against a street railroad company to re-

cover for the death of a valuable dog, evidence that a car was going pretty fast or very fast, does not tend to prove that the car was being driven at an unlawful rate of speed. Baumgardner *v.* Toledo, etc., St. R. Co., 7 N. P. 386, 5 O. Dec. 159.

Res Inter Alios Acta.—An ordinance limiting the rate of speed of street cars in running across the public bridges of a city, is not admissible in evidence to show negligence in running at a greater rate of speed in approaching a bridge. Ulrich *v.* Toledo, etc., St. R. Co., 10 O. C. C. 635, 5 O. C. D. 111, reversed in 67 O. St. 508, 67 N. E. 1100.

SMILEY *et al. v.* PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA.

Jan. 17, 1907.

[56 S. E. 728.]

1. Writ of Error—Decisions Reviewable—Final Judgments—Ordering Rehearing.—Code 1887, § 3454 [Va. Code 1904, p. 1836], allows a writ of error from final judgments or orders. Held, that a writ of error cannot be awarded to an order setting aside a judgment and granting a rehearing, as it is not a final judgment.

On Rehearing.

2. Writ of Error—Decisions Reviewable—Final Judgments—Actions at Law.—Code 1887, § 3454 [Va. Code 1904, p. 1836], provides that any person aggrieved by any order in certain proceedings or any party to case in chancery wherein there is a decree or order dissolving an injunction, etc., or to any civil case wherein there is a final judgment, decree, or order, may present a petition, if the case be in chancery, for an appeal, and, if not in chancery, for a writ of error or supersedeas to the judgment or order. Held, that a writ of error in any case in law was not authorized before final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 329-331.]

3. Same—Ejectment.—Acts 1902-03-04, p. 779, c. 499, amending Code 1887, § 3454 [Va. Code 1904, p. 1836], by providing that any person aggrieved by any judgment, decree, or order in a controversy concerning the title to or boundaries of land, if not in chancery, may present a writ of error to the judgment or order, does not give a party to an action in ejectment the right to review until a final judgment has been entered in the cause.

Error to Circuit Court, Augusta County.

Action by John P. Smiley and others against the Provident Life & Trust Company of Philadelphia. From an order granting defendant's petition to set aside a judgment and for a rehearing, plaintiffs bring error. Writ dismissed.